Statement of David Keating
President, Center for Competitive Politics

Before the Committee on Elections and Ethics
Michigan House of Representatives
December 3, 2013

Thank you for the opportunity to testify before you today regarding SB 661, which would modernize campaign contribution limits and protect free speech rights.

The Center for Competitive Politics (CCP) is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent two nonprofit, incorporated educational associations, one in a challenge to Colorado's campaign finance laws and a second in a challenge to Delaware's laws. The Center is also involved in litigation currently before the U.S. Supreme Court.

The most important provision in the bill is its protection of Michiganders' First Amendment rights to speak about issues at any time, but especially near an election, when citizens are more interested in learning about and debating government policies.

I. Political speech is distinct from issue speech.

United States Supreme Court precedent recognizes the marked difference between speech about candidates and speech about issues.

In *Buckley v. Valeo*,[1] the Supreme Court was tasked with interpreting Congress's efforts to regulate campaign finance through the Federal Election Campaign Act ("FECA") and its amendments. The *Buckley* Court noted that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[2] A key consideration in the political context is safeguarding issue speech from the unconstitutional chill that can result from campaign finance regulation:

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[1] 424 U.S. 1 (1976).
[2] *Id.* at 14 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

> [f]or the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals *and governmental actions*.[3]

Of course, FECA attempted to delineate this thorny distinction—but the *Buckley* Court found that it did so in a way that created a constitutional vagueness problem. Consequently, the Court noted that FECA "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[4] In delineating this distinction, the Court dropped the influential footnote 52, which listed "*Buckley*'s magic words" – "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'"[5]

The distinction, then, between discussion of issues and discussion of candidates ("express advocacy") is not new: it has guided campaign finance law for almost forty years. *Buckley*'s distinction between issue speech and candidate speech rests at the core of every modern First Amendment campaign finance case.

The Supreme Court reiterated the importance of the constitutional carve-out for issue speech in *Federal Election Commission v. Wisconsin Right to Life*,[6] explaining its "functional equivalent" test for what speech may be regulated in the same manner as "express advocacy." *WRTL II* was a challenge to a federal law prohibiting nonprofit corporations from using general treasury funds to pay for electioneering communications. The Court had previously held that this prohibition was not unconstitutional on its face, but the *WRTL II* Court found that it *was* overly broad as applied to Wisconsin Right to Life. In so doing, it highlighted that the burden to demonstrate that speech is subject to regulation as express advocacy or its functional equivalent lies with the state, not the speaker.

Considering the practical difficulty inherent in distinguishing between express advocacy and issue speech, the Court noted that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."[7] Because the speech Wisconsin Right to Life wished to engage in was not "the 'functional equivalent' of express campaign speech," and "the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy," the challenged prohibition was "unconstitutional as applied to the advertisements at issue."[8]

Thus, the Court reiterated that candidate related communications can be regulated in the same manner as express advocacy *only* to the extent that such communications *are its functional*

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[3] *Id.* at 42 (emphasis added).
[4] *Id.* at 44.
[5] *Id.* at 44 n. 52.
[6] 551 U.S. 449 (2007) ("*WRTL II*").
[7] *WRTL II* at 457.
[8] *Id.*

equivalent. This limits such regulation to communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[9]

This is precisely the point: if the state wishes to regulate a particular communication, it bears the burden of showing that the communication is the functional equivalent of express advocacy. Any other rule would inevitably chill protected speech.

Senate Bill 661 simply and correctly proposes to follow U.S. Supreme Court precedent and to remove any ambiguity in the current law about whether certain communications are regulated or not.

The distinction between political speech and issue speech is central to the practical application of the First Amendment. From *Buckley* through *WRTL II* and beyond, the Supreme Court has consistently sought to protect issue speech from regulations covering political speech. SB 661 recognizes these vitally important First Amendment precedents.

II. The Secretary of State's proposal has numerous legal, constitutional and practical problems.

Secretary of State Ruth Johnson recently proposed a new rule that proposes to regulate more speech by making issue speech subject to all of Michigan's campaign finance laws applicable to expenditures containing express advocacy.[10] SB 661 appropriately would override the Secretary's proposed rule.

a. **The proposed rule has no basis in law and its mere proposal chills speech**. In her press release announcing the proposed rule, the Secretary says it is necessary because of "a loophole in Michigan law." If there is in fact a loophole in the law that needs to be closed, then it is up to the Legislature and the Governor to change the law, not the Secretary of State.

   Indeed the state of the law appeared clear prior to the proposed rule. In 2004, a previous Secretary of State declaratory ruling stated that Michigan's law was "similar to FECA's overbroad and vague definition of expenditure…In order to meet the constitutional concerns discussed in *Buckley*, the department interpreted section 6(2)(b) – which excluded from the definition of expenditure those communications that do not support or oppose a candidate or ballot question by name or clear inference – to apply to all non-express advocacy communications.

   "The department eventually attempted to address *Buckley's* constitutional barriers by promulgating an 'issue ad' administrative rule in 1998….These rules were declared

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[9] *Id.* at 470.

[10] Documents relating to the proposed rule and rulemaking are available at http://www.michigan.gov/documents/sos/Proposed_Rules_439978_7.pdf and http://www.michigan.gov/documents/sos/Request_for_Rulemaking_439980_7.pdf.

unconstitutional…" in two federal court cases by groups on the opposite sides of the abortion issue.

Given the litigation history behind the law and a previous rule and the current declaratory ruling, Secretary Johnson's willingness to abandon the rule of law greatly chills speech. The proposal is a radical departure from clear precedent and raises questions about whether, and how, the Secretary of State's Office will enforce other aspects of the law in ways with little or no precedent.

b. **The proposed rule has enormous constitutional problems**. As noted above, a previous issue ad rule was found to be unconstitutional. Her proposed rule also is unconstitutionally vague as she proposes to define express advocacy as including a communication that is within 30 days of a primary or 60 days of a general election; "targeted to voters in the jurisdiction"; and "endors[es] or condemn[s]" a "candidate's position or stance on issues" or "public record."

   There are many unanswered questions raised by such a rule. How is a communication targeted to voters? How many voters would have to be targeted? Two, five hundred, or some other number? Would a communication already posted on a website have to be scrubbed from a website near a primary or general election?

   Also left unanswered, what does it mean to endorse or condemn a candidate's stand on an issue? Would a scorecard of the Legislature become a regulated publication? Would a group be barred from endorsing a bill sponsored by a legislator or proposed by a candidate? Would groups be barred from asking candidates to pledge to support or oppose an issue unless the effort was done by a political committee?

   Even if all these, and many other, questions, could be clearly answered, the rule proposes to regulate "issue speech" and the Supreme Court has repeatedly rebuffed such efforts. To the extent the Court has approved disclosure rules, it has been in response to a legislative record with thorough fact finding supporting the challenged law, not by an interpretive rulemaking proposed by a Secretary of State.

c. **The proposed rule has enormous practical problems and would lead to junk disclosure**. Disclosure is intended to inform voters of the major sources of financial support for political candidates, parties, and PACs. However, overly broad disclosure requirements fail to achieve this goal by muddying up reports with data that confuses, rather than informs, the public. This commonly happens in two ways: by requiring disclosure of donor information for organizations that are not primarily working to elect or defeat candidates, and by requiring disclosure for small dollar donors.

   When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not at all true of donors to 501(c) membership organizations, unions, and trade associations.

As a result, if a group decides to make issue ad expenditures as a small part of the organization's multiple activities, under Secretary Johnson's proposal, all of its donors that give as little as a dollar could potentially be made public, regardless of whether their donations were earmarked for any of the issue ads. People give to trade associations, unions, and nonprofits not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a voice for their views. To publicly identify contributing individuals with expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors, and misleads the public. It is "junk disclosure" – disclosure that serves little purpose other than to provide a basis for official or private harassment, and that may actually misinform the public.

The effect is that disclosure information's primary use becomes for parties and groups to look for potential donors; for nosy neighbors to search; and for some groups, including in at least one publicly reported situation a known terrorist group,[11] to harass and threaten donors to causes or people who work for employers they dislike.

d. **All spending calling for the election or defeat of candidates requires some type of disclosure, and there is more national disclosure today than at any previous time in U.S. history.** The Federal Communications Commission requires all broadcast and cable political or issue advertising to include the name of the entity paying for the ad. Print ads also disclose the payer, and under existing Michigan law, print ads that include any reference to a candidate or election also must disclose the payer's address.[12] Beyond that basic information, candidates, political parties, PACs, Independent PACs and Super PACs must disclose their expenditures, income, and donors. In Michigan, this disclosure includes the name of the group, individual, or other entity that is contributing, the date on which it occurred, and for donations over $100, the size of the donation and the occupation and employer of the donor.

e. **The proposed regulation would give the Secretary of State enormous discretion to determine what speech is "objective."** In the context of ballot measures, communications that "refer to the name or designation" of a measure, and then "endorse or condemn its subject matter," would be regulated as political speech. But if, alternatively, a communication "makes an objective statement of what is in the proposal" and gives the date of the election, it would not be regulated. But clearly what qualifies as "endorsing" or "condemning" may turn on facts regarding the ballot measure's content, and may indeed be "objective" statements. Allowing state officials to determine such fine points will necessarily cause speakers to hedge and trim their messages, and may allow certain messages to receive more favorable regulatory treatment. This is precisely the sort of harm the First Amendment was intended to prevent.

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[11] Gigi Brienza, "I Got Inspired. I Gave. Then I Got Scared." *Washington Post*. Retrieved on October 16, 2013. Available at: http://www.washingtonpost.com/wp-dyn/content/article/2007/06/29/AR2007062902264.html (July 1, 2007).
[12] Michigan Campaign Finance Act § 169.247.

III. Contribution limits.

Michigan currently has among the lowest contribution limits in the nation. For gubernatorial races, 38 states have higher contribution limits. For State Senate races, only six states have lower limits and just two states have lower limits for State House races. I have attached a chart showing how Michigan stands nationally for each type of race. The chart shows both current law and how Michigan would compare if SB 661 became law.

Even if SB 661 becomes law, Michigan will have contribution limits well below the national average. Michigan would rank 27th for gubernatorial races. For State Senate, 30 states would have higher limits, and just 11 would have lower limits. For State House races, 37 states would have higher limits and just eight would have lower limits. Our comparisons are based on the amount that can be given per election cycle in an election year, to make state-by-state figures comparable.

In 1977, Michigan's contribution limits were $13,100 for candidates for governor in today's dollars (to the nearest $100), $3,900 for State Senate, and $1,900 for State House. Even if SB 661 becomes law, the contribution limits will be just over half the original inflation-adjusted figure.

a. **Contribution limits have not been shown to prevent corruption in states that impose them.** The Center for Competitive Politics has compared contribution limits on individuals in all 50 states to public corruption conviction data and found no relationship between the existence of contribution limits and a state's corruption conviction rate. In fact, four of the ten least corrupt states in the country allow unlimited contributions from individuals to state legislative candidates (Oregon, Nebraska, Utah, and Iowa).[13]

b. **Contribution limits do not appreciably improve the quality of governance.** After comparing *Governing* magazine's ranking of all 50 states on the quality of their governance with each state's individual contribution limits, we found no correlation. Moreover, two of the top three states in *Governing*'s rankings – Utah and Virginia – have no limits on the size or source of campaign contributions.[14]

c. **Contribution limits do not curb the legislative influence of corporations, labor unions, and wealthy donors.** Political scientists have found that "campaign contributions had no statistically significant effects on legislation…." Ironically, limits

[13] Matt Nese and Luke Wachob, "Do Lower Contribution Limits Decrease Public Corruption?," Center for Competitive Politics' Issue Analysis No. 5. Retrieved on October 7, 2013. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/08/2013-08-01_Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf (August 2013).

[14] Matt Nese and Luke Wachob, "Do Lower Contribution Limits Produce 'Good' Government?," Center for Competitive Politics' Issue Analysis No. 6. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf (October 2013).

State Individual Contribution Limits by Office per Election Cycle

Governor		State Senate		State House	
Alabama	Unlimited	Alabama	Unlimited	Alabama	Unlimited
Indiana	Unlimited	Indiana	Unlimited	Indiana	Unlimited
Iowa	Unlimited	Iowa	Unlimited	Iowa	Unlimited
Mississippi	Unlimited	Mississippi	Unlimited	Mississippi	Unlimited
Missouri	Unlimited	Missouri	Unlimited	Missouri	Unlimited
Nebraska	Unlimited	Nebraska	Unlimited	Nebraska	Unlimited
North Dakota	Unlimited	North Dakota	Unlimited	North Dakota	Unlimited
Oregon	Unlimited	Oregon	Unlimited	Oregon	Unlimited
Pennsylvania	Unlimited	Pennsylvania	Unlimited	Pennsylvania	Unlimited
Texas	Unlimited	Texas	Unlimited	Texas	Unlimited
Utah	Unlimited	Utah	Unlimited	Utah	Unlimited
Virginia	Unlimited	Virginia	Unlimited	Virginia	Unlimited
California	$54,400	Ohio	$24,311.04	Ohio	$24,311.04
New York	$54,391.67	New York	$16,800	Nevada	$10,000
Ohio	$24,311.04	Nevada	$10,000	North Carolina	$10,000
Georgia	$12,600	North Carolina	$10,000	California	$8,200
New Mexico	$10,400	California	$8,200	New York	$8,200
Idaho	$10,000	Maryland	$6,000	Maryland	$6,000
Louisiana	$10,000	New Jersey	$5,200	New Jersey	$5,200
Nevada	$10,000	Arizona	$5,000	Arizona	$5,000
North Carolina	$10,000	Georgia	$5,000	Georgia	$5,000
Wisconsin	$10,000	Illinois *	$5,000	Illinois *	$5,000
New Jersey	$7,600	Louisiana	$5,000	Louisiana	$5,000
Tennessee	$7,600	New Mexico	$4,800	New Mexico	$4,800
Connecticut	$7,000	Arkansas	$4,000	Arkansas	$4,000
South Carolina	$7,000	Hawaii	$4,000	Tennessee	$3,000
Michigan w SB661	**$6,800**	Tennessee	$3,000	Wyoming	$3,000
Florida	$6,000	Wyoming	$3,000	Oklahoma	$2,500
Hawaii	$6,000	Oklahoma	$2,500	Florida	$2,000
Maryland	$6,000	Connecticut	$2,000	Hawaii	$2,000
Arizona	$5,000	Florida	$2,000	Idaho	$2,000
Illinois *	$5,000	Idaho	$2,000	Kentucky	$2,000
Wyoming	$5,000	Kansas	$2,000	New Hampshire	$2,000
Arkansas	$4,000	Kentucky	$2,000	South Carolina	$2,000
Kansas	$4,000	**Michigan w SB661**	**$2,000**	Vermont	$2,000
Minnesota	$4,000	New Hampshire	$2,000	West Virginia	$2,000
South Dakota	$4,000	South Carolina	$2,000	Washington	$1,800
Washington	$3,600	Vermont	$2,000	Kansas	$1,000
Michigan	**$3,400**	West Virginia	$2,000	**Michigan w SB661**	**$1,000**
Maine	$3,000	Washington	$1,800	Minnesota	$1,000
Oklahoma	$2,500	**Michigan**	**$1,000**	Rhode Island	$1,000
Kentucky	$2,000	Minnesota	$1,000	South Dakota	$1,000
New Hampshire	$2,000	Rhode Island	$1,000	Maine	$750
Vermont	$2,000	South Dakota	$1,000	Delaware	$600
West Virginia	$2,000	Wisconsin	$1,000	Alaska	$500
Montana	$1,260	Maine	$750	Connecticut	$500
Delaware	$1,200	Delaware	$600	Massachusetts	$500
Colorado	$1,100	Alaska	$500	**Michigan**	**$500**
Rhode Island	$1,000	Massachusetts	$500	Wisconsin	$500
Alaska	$500	Colorado	$400	Colorado	$400
Massachusetts	$500	Montana	$320	Montana	$320

Contribution limits are by election cycle, and assume two elections per cycle, except for states that impose per year limits. In these states, only the election year limit is included.

* -- Illinois: In cases where spending by SuperPACs hits a defined amount in a race, then there are no candidate contribution limits.

tend to divert money away from candidate's campaign committees and into independent groups like Super PACs.

d. Contribution limits must not be so low as to be susceptible to constitutional challenge. In its decision in the case of *Randall v. Sorrell*, which dealt with Vermont's state contribution limits, the Supreme Court found that limits could be unconstitutionally low. The Court found that a failure to index contribution limits to inflation, in combination with other factors, may substantially burden First Amendment rights, and therefore render a state's contribution regime unconstitutional. Michigan's $500 limit for races for State House, combined with the current lack of indexing, raises the possibility that this limit might be unconstitutionally low either now or in the future.

Research on contribution limits

A varied and extensive collection of academic research exists that substantiates and informs the arguments made above. A selection of this research shows that: 1) there is indeed "no strong or convincing evidence that state campaign finance reforms reduce public corruption";[15] 2) limiting the size of individual campaign contributions actually increases the likelihood of corruption;[16] 3) these laws restrict individuals' constitutionally protected First Amendment right to participate in the political system, and do not accomplish the goal of reducing corruption;[17] 4) contribution limits stifle the political speech of political entrepreneurs – the individuals and organizations who form and grow new political voices and movements;[18] 5) "campaign finance laws [notably, contribution limits] on net have little impact on turnout in gubernatorial elections," belying the claim that contribution limits put more power in the hands of citizens of lesser means;[19] 6) individuals, not special interests, are the main source of campaign contributions, and that campaign contributions as a percent of GDP have not risen appreciably in over 100 years;[20] 7) "the effect of these contribution limits has been to aid the incumbency advantage in elections";[21] and 8) voting patterns are remarkably stable over time, despite the presence of larger campaign contributions, discrediting the notion that campaign contributions "buy" politicians' votes.[22]

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[15] Adriana Cordis and Jeff Milyo, "Working Paper No. 13-09: Do State Campaign Finance Reforms Reduce Public Corruption?," Mercatus Center at George Mason University. Retrieved on October 9, 2013. Available at: mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf (April 2013).

[16] Philip M. Nichols, "The Perverse Effect of Campaign Contribution Limits: Making the Amount of Money that can be Offered Smaller Increases the Likelihood of Corruption in the Federal Legislature," The Wharton School of the University of Pennsylvania. Retrieved on October 9, 2013. Available at: http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=philip_nichols (April 2008).

[17] Melanie D. Reed, "Regulating Political Contributions by State Contractors: The First Amendment and State Pay-to-Play Legislation," William Mitchell Law Review, Vol. 34:2. Retrieved on October 10, 2013. Available at: http://www.campaignfreedom.org/wp-content/uploads/2012/11/reed2007paytopay.pdf (February 2008).

[18] Jeffrey Milyo, Ph.D., "Keep Out: How State Campaign Finance Laws Erect Barriers to Entry for Political Entrepreneurs," The Institute for Justice. Retrieved on October 10, 2013. Available at: http://www.campaignfreedom.org/doclib/20101001_Milyo2010ContribReport.pdf (September 2010).

[19] David M. Primo and Jeffrey Milyo, "The Effects of Campaign Finance Laws on Turnout, 1950-2000," Department of Economics and Truman School of Public Affairs, University of Missouri. Retrieved on October 10, 2013. Available at: http://economics.missouri.edu/working-papers/2005/wp0516_milyo.pdf (February 2006).

[20] *Ibid.* 3.

[21] Joel M. Gora, "Buckley v. Valeo: A Landmark of Political Freedom," Akron Law Review, Vol. 33:1. Retrieved on October 11, 2013. Available at: http://www.campaignfreedom.org/doclib/20101217_Gora1999Buckleyv.Valeo.pdf (January 1999).

[22] Stephen G. Bronars and John R. Lott, Jr., "Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things that they Do?," The Journal of Law and Economics, Vol. XL. Retrieved on October 11,

Conclusion

Considering the concerns raised above and the findings of the academic community, contribution limits infringe upon the First Amendment's guarantee of freedom of speech, and legislative proposals to raise or lower existing contribution limits should be taken very seriously. These limits have not been shown to prevent corruption. Research shows they have no effect on the quality of governance, and in fact suggests the opposite: states with the highest governance ratings have no limits on the size or source of campaign contributions. In addition, contributions do not "buy politicians' votes," and thus do not have the "corrupting influence" many opponents of free speech imagine. By contrast, research shows politicians' voting patterns are remarkably stable over time, regardless of who donates to their campaign.

2013. Available at: http://www.campaignfreedom.org/wp-content/uploads/2012/11/Bronars-1997-Money-And-Votes.pdf (October 1997).

Submitted by
David Keating

GAB 1.28 Scope of regulated activity; election of candidates.

(1) Definitions. As used in this rule:

(a) "Political committee" means every committee which is formed primarily to influence elections or which is under the control of a candidate.

(b) "Communication" means any printed advertisement, billboard, handbill, sample ballot, television or radio advertisement, telephone call, e-mail, internet posting, and any other form of communication that may be utilized for a political purpose.

(c) "Contributions for political purposes" means contributions made to 1) a candidate, or 2) a political committee or 3) an individual who makes contributions to a candidate or political committee or incurs obligations or makes disbursements for political purposes.

(2) Individuals other than candidates and persons other than political committees are subject to the applicable requirements of ch. 11, Stats., when they:

(a) Make contributions or disbursements for political purposes, or

(b) Make contributions to any person at the request or with the authorization of a candidate or political committee, or

(c) Make a communication for a political purpose.

(3) A communication is for a "political purpose" if either of the following applies:

(a) The communication contains terms such as the following or their functional equivalents with reference to a clearly identified candidate and unambiguously relates to the campaign of that candidate:

1. "Vote for;"

2. "Elect;"

3. "Support;"

4. "Cast your ballot for;"

5. "Smith for Assembly;"

6. "Vote against;"

7. "Defeat;" or

8. "Reject."

(b) The communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and:

1. Refers to the personal qualities, character, or fitness of that candidate;

2. Supports or condemns that candidate's position or stance on issues; or

3. Supports or condemns that candidate's public record.

Rule 169.36a Expenditures for Communications Regarding Candidates and Ballot Questions

Rule 36a. A communication "is in assistance of" or "in opposition to" the nomination or election of a candidate or the passage of a ballot question if either of the following applies:

1) The communication contains terms of express advocacy such as, but not limited to:

"Vote for"
"Elect"
"Support"
"Cast your ballot for"
"Smith for [elective office]"
"Cast your ballot against"
"Vote against"
"Defeat"
"Reject"
"Say NO to"

or

2) The communication is functionally equivalent to express advocacy. A communication is functionally equivalent to express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate or ballot question.

a) Subject to subsection (b), a communication is susceptible of no other reasonable interpretation if it:

i) is made in a period:
(1) beginning on the 30th day before a primary and ending on the day of the primary; or
(2) beginning on the 60th day before an election and ending on the day of the election;

and

ii) is targeted to voters in the jurisdiction(s) where the candidate or issue appears on the ballot;

and either:

iii) supports or opposes a candidate by clear inference by:
(1) referring to the personal qualities, character, or fitness of that candidate;
(2) endorsing or condemning that candidate's position or stance on issues; or
(3) endorsing or condemning that candidate's public record;

or

iv) supports or opposes a ballot question by clear inference by:
(1) referring to the name or ballot designation of the ballot question; and
(2) endorsing or condemning the subject matter of the ballot question.

b) A communication regarding a ballot question is not susceptible of no other reasonable interpretation if the only references in the communication to the ballot question and election are:

i) an objective statement of what is in the proposal; and
ii) the date of the election.

Rule 39f. Independent Expenditures by Corporations, Labor Organizations, and Domestic Dependent Sovereigns. Pursuant to Citizens United v FEC, 130 S Ct 876, 175 L Ed 2d 753 (2010), and Michigan Chamber of Commerce v Land, 725 F Supp 2d 655 (2010), corporations, labor organizations, and domestic dependent sovereigns may make independent expenditures on behalf of candidates for elective office. An independent expenditure made under this Rule shall not be made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate or his or her candidate committee or their agents.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN CLUB FOR GROWTH, INC.; its individual board member, ERIC O'KEEFE; ONE WISCONSIN NOW, INC.; and SCOT ROSS, its executive director,

Plaintiffs,

v. Case No. 10-CV-427

GORDON MYSE, Chair of the Wisconsin Government Accountability Board; THOMAS BARLAND, its Vice Chair; each of its other members, MICHAEL BRENNAN, THOMAS CANE, GERALD C. NICHOL, and DAVID DEININGER; and KEVIN KENNEDY, its Director and General Counsel; each only in his official capacity,

Defendants.

STIPULATION

Defendants Gordon Myse, Thomas Barland, Michael Brennan, Thomas Cane, Gerald C. Nichol, David Deininger, and Kevin Kennedy ("Defendants") and Plaintiffs Wisconsin Club for Growth, Inc., Eric O'Keefe, One Wisconsin Now, Inc., and Scot Ross ("Plaintiffs") (Plaintiffs and Defendants are referred to collectively herein as "the parties") do hereby STIPULATE and AGREE as follows:

1. The Court may enter a permanent injunction, order, and judgment enjoining the application or enforcement of the second sentence of Wis. Admin. GAB § 1.28(3)(b).

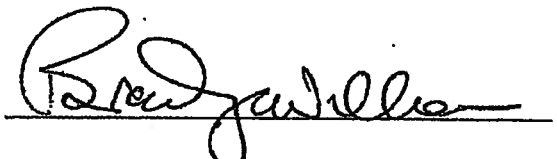
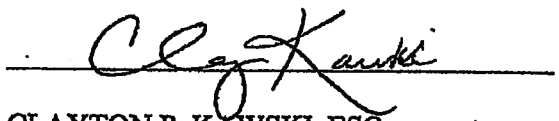
2. Plaintiffs will withdraw their motion for preliminary injunction. If the Court fails to enter the stipulated injunction, Plaintiffs may re-file their motion for preliminary injunction within five (5) days of the Court's decision not to enter the stipulated injunction, or as otherwise permitted by the Court. Should Plaintiffs refile their motion within five (5) days of the Court's decision not to enter a stipulated injunction, Defendants agree to not apply or enforce the second sentence of Wis. Admin. GAB § 1.28(3)(b) until such time that Plaintiffs' motion for a preliminary injunction is decided.

3. The stipulated injunction, if entered, resolves the First Claim of Plaintiffs' Complaint.

4. Plaintiffs will dismiss the Second and Third Claims of their Complaint without prejudice upon entry of the stipulated injunction.

5. Defendants will pay costs, and the parties will enter into good faith negotiations for Defendants to pay Plaintiffs' reasonable attorneys' fees to which they may be entitled. In the event of impasse, the parties will notify the Court, which shall retain jurisdiction to hear any application for Plaintiffs' attorneys' fees incurred in bringing this action and, upon consideration of the application, award such fees as the Court determines appropriate.

STIPULATED AND AGREED.

August 10, 2010 Wisconsin Club for Growth, Inc., Eric O'Keefe, One Wisconsin Now, Inc., and Scot Ross, Plaintiffs  MIKE B. WITTENWYLER, ESQ. State Bar # 1025895 HANNAH L. RENFRO, ESQ. State Bar # 1038324 BRADY C. WILLIAMSON, ESQ. State Bar # 1013896 Godfrey & Kahn, S.C. P.O. Box 2719 Madison, Wisconsin 53701-2719 (608)257-3911 wittenwyler@gklaw.com hrenfro@gklaw.com bwilliamson@gklaw.com Attorney for Plaintiffs	August 10, 2010 Gordon Myse, Thomas Barland, Michael Brennan, Thomas Cane, Gerald C. Nichol, David Deininger, and Kevin Kennedy, Defendants  CLAYTON P. KAWSKI, ESQ. Assistant Attorney General State Bar # 1066228 THOMAS C. BELLAVIA, ESQ. Assistant Attorney General State Bar # 1030182 Wisconsin Department of Justice Post Office Box 7857 Madison, Wisconsin 53707-7857 (608) 266-7477 kawskicp@doj.state.wi.us bellaviatc@doj.state.wi.us Attorney for Defendants

Government Accountability Board

State of Wisconsin

212 E. Washington Ave., Third Floor • Madison, WI 53703 • gab@wi.gov • (608) 266-8005 • Help Desk (608) 261-2028 • http://gab.wi.gov

FOR IMMEDIATE RELEASE:
August 10, 2010

FOR MORE INFORMATION, CONTACT:
Reid Magney, 608-267-7887

G.A.B. Resolves Lawsuit on Campaign Ad Rules

MADISON, WI – The Government Accountability Board has reached a resolution with the plaintiffs in the federal lawsuit filed by Wisconsin Club for Growth and One Wisconsin Now. The Board has agreed to stipulate to an injunction with regard to the application of some of the language in the rule.

"This proposed injunction allows the Board to continue to enforce our administrative rule, consistent with recent United States Supreme Court decisions," said Kevin J. Kennedy, director and general counsel of the G.A.B. "The Board will be able to require disclosure of the identity of those sponsoring communications that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate. Such ads do not need to say "vote for" or "support" to be subject to regulation. The lawsuit's resolution removes language that established an irrebuttable presumption that certain activity should always be considered campaign-related and better reflects the Board's initial intent in promulgating the rule."

Under the terms of the settlement, the Board agrees not to apply the second sentence of Wis. Admin. GAB § 1.28(3)(b) as an irrebuttable presumption. That sentence reads:

> A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and:
>
> 1. Refers to the personal qualities, character, or fitness of that candidate;
> 2. Supports or condemns that candidate's position or stance on issues; or
> 3. Supports or condemns that candidate's public record.

The entire text of Rule 1.28 is available on the G.A.B. website.

The Board agreed to the stipulation on the advice and recommendation of counsel from the Wisconsin Department of Justice. It is subject to approval of the Court.

GAB 1.28 was approved by the Board in March 2010 and submitted to the Legislature, which has the power to block the rule. In July, the Senate Committee on Labor, Elections and Urban Affairs and the Assembly Committee on Elections and Campaign Reform both reported taking no action on the proposed rule. The rule became effective August 1, 2010.

"The focus of this rule has always been to carry out the Legislature's intent to ensure the public's right to know the sources of campaign advertising," Kennedy said.

Wisconsin's comprehensive campaign finance laws, established following the Watergate scandal in the early 1970s, remain in effect, consistent with U.S. Supreme Court decisions. This includes the 25-year-old requirement that committees or individuals making independent expenditures of more than $25 in a calendar year register and disclose the sources of their funding and the nature of their spending. A filing fee of $100 is required only for those groups that spend more than $2,500 in a calendar year.

Because of the ongoing nature of pending lawsuits, the Board is not able to offer further comment on the proposed settlement.

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The Government Accountability Board (G.A.B.) is responsible for administration and enforcement of campaign finance, elections, ethics and lobbying laws in Wisconsin. The G.A.B. is made up of six non-partisan, former judges and is supported by an agency of non-partisan staff members.